

United States Bankruptcy Court

NORTHERN DISTRICT OF ILLINOIS

219 S Dearborn Street

Chicago, IL 60604

KC **FILED**
MAR 14 2006
 MICHAEL W. DOBBINS
 CLERK, U.S. DISTRICT COURT

Kenneth S. Gardner, Bankruptcy Clerk

Date March 14, 2006

Michael Dobbins, Clerk
 United States District Court
 Northern District of Illinois
 219 S Dearborn Street
 Chicago, IL 60604

Case Number 06C273Case Name John GunarttNotice of Appeal Filed 12/30/2005Appellant John Gunartt

Dear Sir:

Pursuant to **Bankruptcy Rule 8007** transmitted herewith is the Record on Appeal. The Record on Appeal consist of:

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Transmittal Letter and Civil Cover Sheet

Designation

Statement of Issues

Transcript of Proceeding

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Supplemental to the Record

Notice of Appeal

Copy of Documents Designated

Exhibits

Expedited Notice of Appeal

Certified Copy of Docket Sheet

Additional Items Included

☐

Total Volumes Transmitted

The following items will be transmitted as a supplemental to the Record on Appeal

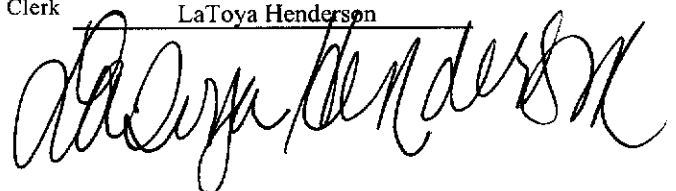
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Transcript of proceedings dated 12/22/2005

Previous D C Judge

Bennelly

Case Number

By Deputy Clerk

LaToya Henderson


JOHN GUNNERT,) No. 05 B 25498
) Chicago, Illinois
) December 22, 2005
 Debtor.) 9:30 a.m.

APPEARANCES:

For Fifth Third Bank: Mr. Gerald Shapiro

For the U.S. Trustee's Office: Ms. Gretchen Silver

Interim Chapter 7 Trustee: Mr. Norm Newman

Court Reporter: Carol Matz
U.S. Courthouse
219 South Dearborn
Room 661
Chicago, IL 60604.

1 THE CLERK: John Gunnert, 05 B 25498.

2 MR. JAMISON: Good morning, your Honor.

3 William Jamison, appearing on behalf of debtor
4 John Gunnert.

5 MR. SHAPIRO: Good morning, your Honor.

6 Gerald Shapiro, appearing on behalf of the
7 secured creditor, Fifth Third Bank.

8 MR. NEWMAN: Good morning, Judge Cox.

9 Norm Newman. I've been appointed the Interim
10 Chapter 7 Trustee.

11 MS. SILVER: Good morning. Gretchen
12 Silver from the U.S. Trustee's Office.

13 MR. JAMISON: Your Honor, as you may
14 recall from our previous hearings --

15 THE COURT: Good morning to all of you.

16 MR. JAMISON: Good morning.

17 I have attached some additional docu-
18 mentation to my motion and renoticed it up before
19 the Court this morning. I would request of the
20 Court, if you're so inclined, just pass it for
21 one moment. I've been advised that the
22 transcript is ready downstairs. I want to go
23 grab a copy of the order. And counsel just
24 advised me that he picked up his copy this
25 morning, so mine should be ready as well.

1 MR. SHAPIRO: Judge, the transcript is
2 ready. I've gone through it. I have no objec-
3 tion to counsel picking up the transcript and
4 reading it.

5 THE COURT: All right.

6 MR. JAMISON: Thank you, your Honor.

7 (Whereupon other matters were
8 heard on the call and the
9 following further proceedings
10 were had herein:)

11 THE CLERK: Recalling 9:30 original
12 motion, John Gunnert, 05 B 25498.

13 MR. SHAPIRO: Good morning again, your
14 Honor.

15 THE COURT: Good morning.

16 MR. SHAPIRO: Gerald Shapiro on behalf
17 of Fifth Third Bank.

18 MS. SILVER: Gretchen Silver from the
19 U.S. Trustee's Office.

20 MR. NEWMAN: Norm Newman, Interim
21 Chapter 7 Trustee.

22 MR. JAMISON: Good morning, your Honor.
23 William Jamison on behalf of the debtor, John
24 Gunnert, who is present here with me today.

25 THE COURT: All right, let's proceed.

1 MR. JAMISON: Okay. Your Honor, this
2 is, once again, our renoticed motion essentially
3 seeking to vacate the order converting this
4 Chapter 11 proceeding to a proceeding under
5 Chapter 7. In our previous court appearance the
6 Court had requested that we submit some documen-
7 tation to the Court supporting our position. We,
8 obviously, cited case law in our motion, but we
9 did want to give the Court more to hang its hat
10 on. What we did was tender to your Honor copies
11 of the appraisal via courtesy copies to your
12 chambers a couple of days ago, along with an
13 amended copy of the motion. We also tendered
14 copies of the leases that we have pending right
15 now on this commercial property and two contracts
16 which we have for the sale of certain units that
17 was delivered in our package to your Honor.

18 Those things were given because we
19 think these things are central to him reorganiz-
20 ing. What Mr. Gunnert is attempting to do is to
21 sell units. We have six fully completed
22 condominium units. Those units are valued at
23 \$810,000. It's secured by a first priority
24 mortgage by Fifth Third Bank. They assert a
25 claim at present as about \$753,000, is what I

1 recall counsel initially telling what their claim
2 was.

3 Though we do not concede that amount,
4 we attached to our motion a payoff statement or
5 receipt -- excuse me -- a statement from Fifth
6 Third which was about \$621,000. Counsel said
7 that doesn't include interest and attorneys' fees
8 so I requested he put a proof of claim on file so
9 we can address that, and he said he would
10 subsequently.

11 Your Honor, our first objection was
12 that the notice on this motion was short. He was
13 only given eight days within which to respond to
14 this motion.

15 I did procure a copy of the transcript
16 and have given it a cursory review. I do not see
17 where his prior counsel actually objected to the
18 shortened notice, but I believe the impetus and
19 the responsibility of moving on a motion on short
20 notice is on counsel, not so much whether you're
21 objecting but not so much whether his prior
22 counsel objected.

23 I cited In re Sandra Cotton, 865 BR
24 163, which says that the moving party must
25 advance certain and special circumstances that

1 would justify shortening notice. My review of
2 their motion certainly didn't show any special
3 circumstances, and even in reviewing the
4 transcript I do not see where they asserted any
5 special circumstances that would justify a
6 shortened notice. Noticed counsel did not object
7 to it being -- to it proceeding on a shortened
8 notice, your Honor. But, notwithstanding, I
9 don't believe they met their burden in going
10 forward in that manner.

11 Secondly, your Honor, they're arguing
12 to convert under 1112(b). Essentially what
13 their -- their claim is that there is a diminu-
14 tion in value. It's remiss throughout their
15 pleadings that this has declined in value,
16 there's a loss, this isn't feasible.

17 These are properties that are ready for
18 sale. There is no diminution in value. They
19 offer no evidence to diminution in value other
20 than the blanket statement that there is
21 diminution in value. What we have given the
22 Court is proof that these properties have value
23 with these appraisals that exceed their claim.

24 Now, the appraisal that we submitted to
25 the Court is only for one of the properties. One

1 of the properties is sufficient to pay off their
2 claim. We've got other properties. We've got
3 two leases for commercial units right now at
4 \$3,000 a month that we're just waiting to sign.
5 They haven't been signed, obviously, because
6 we're not sure where we are with regard to this
7 Chapter 11 proceeding. But we've got H & R Block
8 and we've got an Austin Market.

9 Now, your Honor, I'm very familiar with
10 this area. I grew up in the Austin area. I know
11 it's an upcoming and developing area. We've got
12 two tenants that are active about it, and they've
13 been inundating my client with calls wanting to
14 know can they get these leases in this unit.

15 In addition to the commercial property,
16 above that I believe are eight residential units.
17 Now, those units are not completed.

18 MR. SHAPIRO: Nine. Excuse me.

19 MR. JAMISON: Excuse me. There are
20 nine residential units.

21 Now, those units are not completed.
22 They are approximately 60 percent completed. Our
23 position would be that we would like to -- we're
24 going to complete two of those and really just
25 sell them as models, your Honor.

1 But my point is that there is
2 sufficient -- there's a equity cushion here for
3 Fifth Third Bank. There's more than enough
4 assets in this estate to pay off all creditors,
5 including unsecured creditors, at 100 percent.
6 We've got contracts pending right now. Closing
7 on those two contracts alone, we imagine the net
8 will be approximately 250,000, which we would be
9 tendering to the secured creditor, knocking their
10 claim down. Within the next 12 months we antici-
11 pate having Fifth Third out of this proceeding
12 and then essentially we're dealing with the
13 general unsecured creditors.

14 The other secured creditors have
15 mortgages and notes and we're going to pay those
16 per the plan in accordance with the terms of
17 mortgages and notes which don't mature till 2035.

18 MR. SHAPIRO: Judge --

19 THE COURT: Response?

20 MR. SHAPIRO: In response, your Honor,
21 counsel is basically asking for two bites out of
22 the same apple. Mr. Gunnert was represented here
23 previously. Mr. Elsworth was in court. The
24 transcript -- and counsel will acknowledge this.
25 I know your Honor has not read the transcript

1 yet. But counsel will acknowledge he did not ask
2 for any time to file a response to my motion, he
3 did not file any objection to the timeliness of
4 the motion.

5 This plan that is on file, your Honor,
6 still is a loser. It still impairs my client.
7 My client's debt is stated at the last hearing
8 and which is in the transcript. My client's debt
9 was fully matured in June of 2002. There is
10 basically no money in this plan. There's no
11 money from a third source, there's no money from
12 the income flow of this property. There is no
13 money in this plan.

14 Counsel has talked about leases that
15 are possibly pending. This is information that
16 could have been presented to the Court, possibly,
17 the last time we were in court.

18 There was also no request for a
19 continuance because of counsel or Mr. Gunnert
20 supposedly being in the process of obtaining
21 appraisals on the property. The appraisals
22 counsel has and the appraisals I have which were
23 obtained by my client, Fifth Third Bank, there's
24 a very large discrepancy between them.

25 THE COURT: Then why don't we have an

1 evidentiary hearing? If there's a big discrep-
2 ancy, why don't we hear from the appraiser?
3 Rather than just going back and forth about the
4 validity, let me hear him.

5 MR. SHAPIRO: Judge, with regard to the
6 property, the property --

7 THE COURT: I mean, I enjoy listening
8 to counsel, but when it comes to evidence I need
9 to assess it.

10 MR. SHAPIRO: Judge, with regard --

11 THE COURT: Bring him in, because it is
12 a crucial issue. Let me hear it.

13 MR. SHAPIRO: Judge, again, what I'm
14 trying to point out --

15 THE COURT: I appreciate you all
16 comments, but they're more in the nature of
17 impeachment. But I haven't heard any evidence
18 yet.

19 MR. SHAPIRO: Judge, I don't think -- I
20 think the time for hearing evidence came and went
21 on the date of the hearing that we had when --

22 THE COURT: Counsel brought up an
23 interesting point. He said that when you filed
24 the motion and it was heard on short notice you
25 should have made a motion. Or was it he should

1 have made a motion --

2 MR. SHAPIRO: He said --

3 THE COURT: -- to have the notice
4 shortened?

5 MR. SHAPIRO: I did not do that, your
6 Honor.

7 THE COURT: All right, go ahead.

8 MR. SHAPIRO: Your Honor, there was a
9 full hearing on that date. On that date your
10 Honor found -- and it's included in the
11 transcript -- that this plan was illusory, the
12 first plan that was filed. This plan does
13 nothing more than that. It's the same thing.
14 There is no money in this estate. The only money
15 that can be garnered is by selling the asset
16 which is -- my client has a lien on the entire
17 property.

18 The reason that I brought a motion to
19 convert instead of a motion to modify stay with a
20 fully matured debt was because I thought it was
21 in the best interest of all creditors, all
22 creditors that this property be liquidated as
23 soon as possible.

24 As I pointed out to the Court
25 previously, over the course of years Mr. Gunnert

1 had an occupancy permit for the six units that
2 were finished back in 2001 and yet never rented
3 any of the units. He had a broker and had
4 several contracts for sale of the properties, the
5 six units, various portions of the property, and
6 there was never a closing that took place. My
7 client had consented to a conversion of the
8 property to condominiums and no one ever asked me
9 or my client for a payoff letter. No closings
10 ever took place.

11 With regard to the hearing that took
12 place on November 16th, when this -- when your
13 Honor entered an order converting this to a
14 Chapter 7, counsel and his client had two
15 contracts in court on that date. The contracts
16 that are attached to my client's motion are two
17 other contracts.

18 The gist of my whole argument today,
19 your Honor, is the fact that on our -- is the
20 fact that on November 16th there was a full
21 hearing. Everything took place on that date.
22 Your Honor ruled on that date. And I think that
23 the motion from November 16th should be
24 sustained, this case should still remain a
25 Chapter 7 because it's in the best interest of

1 all creditors that this property be liquidated as
2 fast as possible.

3 And Mr. Gunnert has a history of not
4 following through or liquidating anything.

5 MR. JAMISON: That's not true, your
6 Honor.

7 MR. SHAPIRO: He's been rehabbing these
8 properties since the year 1999. We have a
9 matured loan from June of 2002. We've had fore-
10 closure litigation that was pending in state
11 court since 2002 that was stayed as a result of
12 this Chapter --

13 THE COURT: What stage is the
14 foreclosure litigation in?

15 MR. SHAPIRO: There was a judgment that
16 was vacated, your Honor, in June of 2005, and --

17 THE COURT: Why was it vacated? Do you
18 know?

19 MR. SHAPIRO: Yes, I do know. I was
20 there, your Honor.

21 Mr. Gunnert at that time, after he had
22 had five prior counsel, presented a pro se
23 motion. Judge Bush vacated the judgment of
24 foreclosure and admonished Mr. Gunnert to be back
25 in court in two weeks with a plan as to how the

1 bank was going to be paid in an expeditious
2 manner. I asked the Court at that time who his
3 counsel was who couldn't be present in court that
4 day. He indicated that his name was John
5 Elsworth. I indicated to the Court that John
6 Elsworth was a bankruptcy attorney. I came back
7 to court two weeks later and the case was stayed
8 because Mr. Gunnert had filed his Chapter 11.

9 Since the filing of this Chapter 11, it
10 took until November before there was a plan
11 filed. There had been nothing done with regard
12 to retaining a broker until several months after
13 the plan was filed. Your Honor had set this
14 matter over for a status call to November 16th of
15 2005, and that is the reason that I had my motion
16 presented on that date. And the reason why there
17 wasn't 20 days' notice with regard to my motion
18 was because Mr. Gunnert's plan wasn't filed until
19 shortly before the status hearing date.

20 And for all of those reasons, your
21 Honor, I think that the motion should be denied
22 and this matter should stay in a Chapter 7
23 because it's in the best interest of all
24 creditors that this property be liquidated as
25 expeditiously as possible so that my client is

1 paid and other creditors are paid in full, and
2 whatever excess proceeds there may be, if any,
3 would be going to Mr. Gunnert.

4 The trustee has already indicated
5 previously --

6 THE COURT: You told me that the
7 judgment for foreclosure was vacated. You didn't
8 tell me why.

9 MR. SHAPIRO: Mr. Gunnert presented a
10 pro se motion --

11 THE COURT: What was his basis? Why
12 was it vacated, if you know?

13 MR. SHAPIRO: There was not an opinion
14 written by the Court, your Honor.

15 THE COURT: Was there any reason? I
16 mean, something must have happened. I'm just
17 trying to figure out what's going on.

18 I'm sorry. Mr. Jamison, are you
19 finished with your motion?

20 MR. JAMISON: May I respond, your
21 Honor, to some of his allegations, please?

22 And one is that he said there's no
23 money to fund this plan. And, your Honor, as I
24 expressed before, this is a sole proprietorship.
25 It's not a corporation. Mr. Gunnert is a

1 licensed appraiser. Part of funding his plan is
2 his income. So we'll use his income to help fund
3 this plan. We have legitimate leases from viable
4 corporate entities who want to lease this
5 property, and they're ready to start January 1st.
6 We have contracts for sale dated January 16th.

7 THE COURT: What happened with the
8 foreclosure? Does anybody know what happened?

9 MR. JAMISON: It was my understanding,
10 your Honor, that there was a motion for summary
11 judgment that had previously been granted.
12 Apparently, Mr. Gunnert filed a motion and the
13 Court said there is a genuine issue of material
14 fact and they cannot go forward on a motion for
15 summary judgment and vacated it.

16 THE COURT: So there had been a default
17 judgment entered previously?

18 MR. SHAPIRO: No.

19 MR. JAMISON: A summary judgment.

20 MR. SHAPIRO: It was a motion for
21 summary --

22 THE COURT: Oh, for summary judgment.
23 All right.

24 Anything further, Mr. Jamison?

25 MR. JAMISON: With regards, your Honor,

1 we would implore the Court to in this case use
2 its equitable powers, your Honor. This is a rare
3 situation where we have a sole proprietor whose
4 personal residence is at risk in this bankruptcy
5 proceeding where we have assets that are suffi-
6 cient to pay off this creditor. And we would
7 be -- and our plan would propose 12 months to
8 sell these units. January 16th is right around
9 the corner. At a minimum, if we could put it
10 beyond that point, see whether these properties
11 sell.

12 THE COURT: But he told me the debtor
13 has been promising to sell these properties for
14 more than a year or so.

15 MR. JAMISON: Well, I can do two
16 things, one of two things I see, your Honor.

17 THE COURT: I mean, if that's it, if
18 that's what has been going on and nothing has
19 been happening, what's to say it's going to
20 change?

21 MR. JAMISON: Your Honor, one thing I
22 can say, first of all, is that what brings
23 most -- what brings entities to bankruptcy is
24 because they're hard on financial times. That
25 happens to be the case in this situation. He's

1 got --

2 THE COURT: Well, maybe the plan is not
3 realistic.

4 MR. JAMISON: I have put together
5 investors that are seeking to do it. He came to
6 my office, and I have viable investors, your
7 Honor.

8 Now, with regard to the two that he has
9 pending, these were listed with brokers, so we've
10 got these two scheduled to close on January 16th.
11 We're only looking for a couple of weeks.

12 But I've brought investors in, too,
13 that would just buy the units as the four units
14 solid. They're not looking at a partial amount
15 going to individual units. I'd like to have an
16 opportunity to see if we can consummate that
17 transaction.

18 And I want to remind the Court this is
19 a 100 percent plan. No one is taking -- we're
20 not cramming down on anyone. No general un-
21 secureds are not getting paid in full. It's a
22 100 percent plan.

23 And it's a short leash. We're only
24 asking for 12 months to consummate and at least
25 pay off the secured creditors. And with regards

1 to all the other creditors, we will pay off -- we
2 want 12 months to pay off this secured
3 creditor -- let me qualify that -- Fifth Third
4 Bank. The other secured creditors will be paid
5 in accordance with the terms of the notes and
6 mortgages signed by Mr. Gunnert with them
7 originally.

8 With regards to the general unsecured,
9 once we sell the sixth unit we've still got the
10 other unit that's pending. We're selling those
11 units as well. And the sale of actually one of
12 those units would be sufficient to pay off the
13 general unsecured in its entirety. Mr. Gunnert
14 would be left after paying 100 percent of all his
15 creditors with his commercial property and also
16 eight units within which he could do what he
17 pleases because all of his creditors would have
18 been paid.

19 Your Honor, it would just be a travesty
20 for Mr. Gunnert to lose all of his properties'
21 investment that he's worked so hard to put
22 together, he got these properties together, when
23 he's in a position to actually pay off his
24 creditors.

25 I take issue with the fact -- it

1 doesn't -- I'm not concerned with the fact that
2 he litigated in state court. And the judge
3 vacated. The judge vacated for a reason. The
4 judge saw that this man deserved an opportunity
5 to respond to whatever allegations there were on
6 summary judgment, and the judge said no.

7 THE COURT: All right. Anything
8 further?

9 MR. SHAPIRO: Well, Judge --

10 THE COURT: Anything further, Mr.
11 Jamison?

12 MR. JAMISON: No. Your Honor. That's
13 it.

14 MR. SHAPIRO: Judge, we still have the
15 situation where my client is impaired, we have
16 the situation where there were contracts before
17 over two years ago. We have a situation where
18 your Honor ordered that the listing agreement
19 only be good for 45 days, which was to the status
20 date when this was last up when my motion was
21 presented to the Court. And there's actually no
22 authority for them to go forward with the broker
23 at this juncture because the broker -- the list-
24 ing agreement was supposed to expire on the
25 status hearing date.

1 Mr. Elsworth had originally come to
2 court and had a listing agreement for approxi-
3 mately six months. I was supposed to get a
4 revised listing agreement showing that that
5 listing agreement expired on November 16th. I
6 indicated to the Court at that time that I never
7 received that agreement. Mr. Elsworth told me
8 that I did get the agreement, I received it
9 previously. But that was the listing agreement
10 for six months, not for any 45-day period which
11 expired on November 16th.

12 We still have the same situation, your
13 Honor, that my client is impaired. We have a
14 fully matured debt, we have a situation where Mr.
15 Gunnert in the past has not liquidated any of the
16 collateral timely with regard to listing it with
17 a broker previously. I see no reason why that
18 will be done now. And I feel that under the
19 circumstances that this plan is still illusory.
20 There is no cash. The Court denied use of cash
21 collateral previously. And with my client being
22 impaired because we have to wait 12 more months
23 until this property is supposedly going to be
24 liquidated that this motion should be denied.

25 MR. JAMISON: Your Honor, I object to

1 that. We did not say 12 months before they would
2 receive any funds, we said in the next 4 to 16
3 days, January 16th, we would be turning over
4 approximately \$2,200 or \$50,000.

5 MS. SILVER: Your Honor, I just want to
6 note for the record --

7 THE COURT: Miss Silver, go right
8 ahead.

9 MS. SILVER: -- that there is no motion
10 to sell pending, and debtor is not authorized
11 under either Chapter to sell that property with-
12 out Court approval. If they have a closing
13 scheduled for January 16th they are pushing the
14 deadline on 20 days' notice for sale.

15 THE COURT: What is your position on
16 the motion to vacate?

17 MS. SILVER: I've read the transcript.
18 Mr. Friedman represented our office at the last
19 hearing. And I have not seen anything that would
20 change our office's position. We supported the
21 motion to convert, and I don't see a reason to
22 alter that order at this point.

23 MR. JAMISON: May I respond to that,
24 your Honor?

25 THE COURT: Very quickly.

1 MR. JAMISON: I'm a bit perplexed by
2 the trustee's position that they see nothing
3 additional. The original motion filed by counsel
4 only listed the value of my client's property at
5 about \$470,000. The appraisals that we tendered
6 to the trustee's office list the value of the
7 property at \$810,000. I think that's a
8 substantial change if they take that into
9 consideration. And it also provides the moving
10 party with an equity cushion that he otherwise
11 wouldn't have based on his appraisal that he
12 submitted to the Court.

13 MR. NEWMAN: Your Honor, Norm Newman.

14 THE COURT: Mr. Newman, go ahead.

15 MR. NEWMAN: I reiterate what I said at
16 the last hearing, which is that even if the case
17 remains in Chapter 7 I recognize that there is a
18 potential that this would be a surplus estate and
19 that Mr. Gunnert could get significant funds
20 back. And that with respect to the issue about
21 that I would be selling his personal residence
22 and throwing him out on the street, I said to the
23 Court that my first order of business here would
24 be to try to find buyers for the investment
25 property and get -- if we get sufficient funds to

1 pay off all the debt, then at that point the case
2 could then be dismissed and I would not sell Mr.
3 Gunnert's residence except that --

4 THE COURT: Well, the real issue here
5 is whether you're going to sell the property or
6 the debtor.

7 MR. NEWMAN: Yeah.

8 And in the context -- and, speaking of
9 investors, these parties could submit their
10 offers to me to buy the units, I could come into
11 court to sell. If Mr. Jamison has an investor
12 group that wants to buy units, they could put --
13 bring the offer to me, we could all talk, the
14 debtor, the bank and myself. And if these offers
15 make sense for everyone, then I would bring them
16 to the Court to approve the sales. And basically
17 it would be putting me in the middle of the bank
18 and Mr. Gunnert, who, obviously, are not seeing
19 eye-to-eye here.

20 So, again, I don't see any -- it's not
21 so terrible that the case is in Chapter 7 if the
22 values are what Mr. Gunnert says they are.

23 MR. JAMISON: Your Honor --

24 THE COURT: Go ahead.

25 MR. JAMISON: -- obviously, he said

1 whatever surplus we have. There's been a
2 petition filed for \$17,000 from his prior
3 counsel. We're not looking -- I mean, Mr.
4 Gunnert is not looking to pay unnecessary fees if
5 he could administer it himself and get this
6 accomplished, your Honor, which we're confident
7 that we can do.

8 I think after January we'll be in a
9 better light because with regard to the motion to
10 sell, obviously, we know we have to get a motion
11 on file. We need to know where we're going with
12 this case and those contracts --

13 THE COURT: Well, if you'd had it on
14 file --

15 MR. JAMISON: Well, your Honor, the
16 contracts were entered subject to court approval
17 on each contract, so they know that there is no
18 deal without this Court's approval. And we made
19 it that way.

20 THE COURT: I notice that the debtor's
21 motion to vacate also in the alternative asks to
22 dismiss the Chapter 11.

23 MR. JAMISON: That's correct, Judge.

24 THE COURT: Any objection to that?

25 MR. SHAPIRO: Yes, your Honor, we

1 object to that. We feel that it would be in the
2 best interest of my client and in the best
3 interest of all creditors that this property be
4 liquidated as quickly as possible through the
5 bankruptcy proceeding. Mr. Gunnert --

6 THE COURT: Rather than going through
7 foreclosure without a bankruptcy at all?

8 MR. SHAPIRO: Correct, Judge.

9 At this stage, your Honor, we feel the
10 fastest way to liquidate the property is through
11 the Chapter 7 trustee. Because if we go back to
12 state court we have to go back and re-present a
13 new motion for summary judgment or get a trial,
14 one or the other, and it could be many, many
15 months before the property is liquidated.

16 Mr. Gunnert chose and elected to file
17 this Chapter 11, and under the circumstances it
18 is in the best interest of creditors that this
19 matter be converted. The monthly reports that
20 were filed that I indicated to the Court I had
21 for every month but September indicate that there
22 is no income for this property. The only way
23 that this matter can be resolved is if the
24 property is sold. I question whether or not any
25 units will be sold or if all the units will be

1 sold. But under any circumstances my client is
2 impaired because they have to wait another 12
3 months, possibly, until we get paid. That's what
4 they're asking for in their plan.

5 MR. JAMISON: With regards to
6 dismissal, your Honor, I would expect counsel to
7 object. The order of foreclosure was vacated by
8 the Court. The Courts thought that he deserved a
9 chance to respond to them.

10 They don't want to have to file a
11 motion in response that they may very well lose.
12 He's assuming that he's going to prevail on it.
13 The judge may find that there were some
14 deficiencies in the original complaint and have
15 to start all over.

16 I know they don't want to go back to
17 state court and actually try to litigate this
18 thing. But expediency is not the only issue
19 here. We can present a feasible plan, your
20 Honor, that addresses everyone's concerns. We're
21 asking for a limited opportunity. This isn't a
22 long plan. A limited opportunity.

23 I cannot address what his prior counsel
24 does -- did, and I'm not going to attempt to do
25 that, your Honor. All I can say is that when

1 they bring a motion they have a burden, and I
2 don't believe they met their burden on diminution
3 in value. If that's the basis on which they're
4 trying to convert this case they have to say more
5 than just there's a diminution in value. They
6 have to show how there's a diminution.

7 They didn't do that. We gave
8 appraisals because, obviously, there's an issue
9 as to valuation here, and I would agree with the
10 Court that we need, possibly, an evidentiary
11 hearing on that matter.

12 But, your Honor, we would submit to the
13 Court that this plan is feasible, that it can
14 be -- this case can be reorganized successfully
15 and these debtors can be paid at 100 percent --
16 these creditors can be paid at 100 percent.

17 MR. SHAPIRO: Judge, there was no
18 argument about --

19 THE COURT: Go right ahead.

20 MR. SHAPIRO: -- diminution in value.
21 What was argued was that the plan was illusory.
22 And what was also argued was is that my client is
23 impaired.

24 THE COURT: Right.

25 I'm going to pass the matter. I'm

1 going to at least scan this transcript. I
2 haven't seen it, since it was just obtained this
3 morning.

4 Does anyone have a copy for me?

5 MR. SHAPIRO: I have a copy, if I
6 could --

7 THE COURT: All right. I'll pass this
8 matter.

9 MR. SHAPIRO: Okay. Thank you.

10 MR. NEWMAN: Your Honor, I may be in a
11 different courtroom --

12 THE COURT: I understand.

13 MS. SILVER: -- handling matters. I'll
14 come back if I can be here.

15 Thank you.

16 THE COURT: I'll pass it. Let me
17 finish the rest of my call, and then I'll get
18 back to you.

19 MR. JAMISON: Your Honor, do you have
20 any idea how long it would be? I have another --

21 THE COURT: I have no idea.

22 MR. JAMISON: -- court appearance to --

23 THE COURT: I have no idea.

24 MR. JAMISON: Okay. Thank you, Judge.

25 THE COURT: I passed it.

1 MR. JAMISON: Okay. Thank you.

2 (Whereupon other matters were
3 heard on the call and the
4 following further proceedings
5 were had herein:)

6 THE CLERK: An original motion from
7 9:30, John Gunnert, 05 B 25498.

8 MR. SHAPIRO: Good morning again, your
9 Honor. Gerald Shapiro on behalf of Fifth Third
10 Bank.

11 MR. JAMISON: Good morning, your Honor.
12 William Jamison on behalf of the debtor, John
13 Gunnert, who is present here with me today.

14 MS. SILVER: Gretchen Silver from the
15 U.S. Trustee's Office.

16 MR. NEWMAN: And Norm Newman, Interim
17 Chapter 7 Trustee.

18 MR. SHAPIRO: Your Honor, I just wanted
19 to apologize to the Court. I thought I had left
20 some of my documents in the transcript that I
21 handed up to your Honor to review, and that's why
22 I --

23 THE COURT: Well, you discussed it with
24 my clerk, and that's who you're supposed to
25 discuss it with.

1 MR. SHAPIRO: Well, I apologize to the
2 Court, your Honor. I did look through it and I
3 found them.

4 Your Honor, I just wanted to mention a
5 couple of things so that it's clearly in the
6 record, if I could.

7 THE COURT: Go right ahead. I'm
8 listening.

9 MR. SHAPIRO: With regard to this
10 matter, the original Chapter 11 was filed on June
11 28th. The plan was ordered to be filed by the
12 Court by November 8th and was filed by Mr.
13 Elsworth on November 7th. My motion was filed on
14 November 8th, one day after the plan was filed,
15 and it was scheduled for hearing on November 16th
16 because that date had already been scheduled by
17 the Court for a status date with regard to the
18 listing agreement and with regard to any
19 contracts for sale of the property.

20 With regard to my client's balance, my
21 client's balance as of today's date, your Honor,
22 is \$782,994.59 plus attorney's fees which have
23 accrued after December 13th which are not in my
24 billing system yet and interest which is accruing
25 at \$208.10 per day.

1 The reason a claim has not been filed,
2 your Honor, is because the claim deadline was
3 December 27th and this matter was converted to a
4 Chapter 7 on November 16th, so that that claim,
5 that line for the Chapter 11 was moot, and at
6 some point in time, assuming that the Chapter 7
7 remains in effect, I will be filing a claim on
8 behalf of Fifth Third Bank.

9 That claim amount varies because this
10 interest is based on a floating rate and the
11 interest rate varies as the interest rate has
12 increased because of prime increasing recently.

13 With regard to diminution of value,
14 your Honor, the Court generally looks to post
15 petition cash flow. And in this instance, as I
16 pointed out to the Court, there is no cash flow
17 from this property whatsoever.

18 Based on all of those things and the
19 arguments that I made before that this plan is
20 illusory and my client is impaired because
21 there's another 12 months to be spent pursuant to
22 the plan for these properties to be sold and we
23 have a fully matured debt, I again reiterate what
24 I stated before, that I believe that this motion
25 should be denied.

1 THE COURT: Anything further from any-
2 one else?

3 MR. JAMISON: Your Honor, just with
4 regards to the plan that we have on file,
5 obviously, I haven't seen anything. It's not
6 because I'm doubting counsel's veracity, but
7 we'll review (indiscernible) may very well be
8 objecting to it.

9 With regards to his comment on
10 diminution of value, I would just reiterate to
11 the Court that in the case of In re Richmond
12 Ready Mix Corp., 37 BR 456, the Court held that:
13 It has further been held by the Court that
14 continuing loss of diminution in value of the
15 estate may be tolerated where reorganization is
16 feasible and a pattern of unprofitable operations
17 can be reversed as a result of a successful
18 reorganization."

19 We have leases that are prepared for
20 execution, your Honor, from two corporations that
21 will come in and begin leasing the commercial
22 units. That's \$3,000 a month rent that they will
23 be paying.

24 This is a sole proprietorship. Mr.
25 Gunnert will be using his personal income in

1 addition to that in funding this plan. And the
2 other units are just we intend to sell those
3 outright to pay off Fifth Third. So notwith-
4 standing his comment that post petition is what
5 the Court can look at, there is case law that
6 says that we can go beyond that.

7 MR. SHAPIRO: Judge, a short reply.

8 All of these matters are things, other
9 than these new leases and the new contracts, are
10 things that could have been obtained at the time
11 of the hearing or should have been obtained at
12 the time of the hearing on November 16th. There
13 was nothing that would have prevented Mr. Gunnert
14 or his counsel on November 16th from having
15 appraisals available at that time, objecting to
16 the hearing and not wanting to go ahead with it
17 at that time or asking for time to file a written
18 response to my motion. None of that was done and
19 a full hearing took place.

20 THE COURT: Anything further, Miss
21 Silver?

22 MS. SILVER: Nothing further.

23 MR. NEWMAN: Nothing.

24 THE COURT: All right. I'm going to
25 deny the debtor's motion to vacate. Issues

1 involving timeliness can be waived. The problem
2 is that nothing was said, as far as I can tell,
3 and nobody points anything out in the transcript
4 indicating that the debtor objected to having the
5 hearing proceed on the 16th. The debtor did not
6 ask for time to do anything else.

7 The main case supporting this is a 2004
8 U.S. Supreme Court case. In fact, it came out of
9 this Bankruptcy Court, Judge Schwartz. When a
10 debtor does not assert their time limit rights
11 they waive them.

12 The motion to vacate is denied. I will
13 leave the matter in a Chapter 7.

14 I think that the problem with the
15 debtor is that I just don't sense or perceive
16 that the debtor is serious about bankruptcy. And
17 what bothered me most on November 16th was the
18 representation in the plan that the creditors
19 would be paid at confirmation and then there was
20 an about face. There seems to be this effort to
21 move forward if you can and then when somebody
22 raises an objection you just change positions.
23 It just doesn't -- I just don't get the sense
24 that the debtor is serious about bankruptcy, that
25 he can and will comply with all of the

1 requirements.

2 You have to comply with these creditors
3 when you have to file reports and give them
4 things and get court authorization, file reports
5 with the U.S. Trustee, and it requires a lot. It
6 has to be totally transparent. You're talking about
7 other people's property, you're talking about other
8 people's interests. And to avail yourself of the
9 extraordinary relief that we give you have to make a
10 lot of efforts, and I just don't see you doing that

11 I was stunned by the representation
12 that everybody would be paid at confirmation and
13 then there was like a five-second total about
14 face. It just lacks good faith.

15 The motion to vacate is denied.

16 MS. SILVER: Thank you, your Honor.

17 MR. SHAPIRO: Thank you, your Honor.

18 (Which were all the
19 proceedings had in the above-
20 entitled cause, December 22,
21 2005, 9:30 a.m.)

22 I, CAROL MATZ, CSR, RPR, DO HEREBY CERTIFY THAT THE
23 FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF
24 PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.
25